

United States

53/42
Circuit Court of Appeals

For the Ninth Circuit.

IN THE MATTER OF BERLIN and RUSSELL
AIRCRAFT MACHINE and MANUFAC-
TURING COMPANY, a copartnership,
Debtor,

CALIFORNIA EMPLOYMENT COMMISSION,
an administrative agency of the State of Cali-
fornia,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MA-
CHINE AND MANUFACTURING COM-
PANY, a co-partnership of H. M. BERLIN and
C. T. RUSSELL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED
JUL 25 1942
PAUL F. O'BRIEN
CLERK

NO. 10173

United States

Circuit Court of Appeals

For the Ninth Circuit.

IN THE MATTER OF BERLIN and RUSSELL
AIRCRAFT MACHINE and MANUFACTURING COMPANY, a copartnership,
Debtor,

CALIFORNIA EMPLOYMENT COMMISSION,
an administrative agency of the State of California,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership of H. M. BERLIN and C. T. RUSSELL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

EARL WARREN,
Attorney General of the State of California.

JOHN J. DAILEY,
Deputy, 600 State Building, San Francisco,
Calif.

MAURICE P. McCAFFREY,
SAMUEL L. GOLD, and
GLENN V. WALLS,
Of Counsel,
1025 P. Street, Sacramento, Calif.

For Appellee:

CHARLES PECKHAM,
710 Title Insurance Bldg., Los Angeles, Calif. [1]*

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division.

No. 38270-H

IN BANKRUPTCY

In the Matter of:

BERLIN AND RUSSELL AIRCRAFT MA-
CHINE AND MANUFACTURING COM-
PANY, a co-partnership,

Debtor.

AGREED STATEMENT OF CASE

The California Employment Commission was at all times involved herein and is now the duly appointed and acting administrative agency of the State of California created by and exercising the powers conferred upon it by the public statute of the State of California known as Chapter 352 of the Statutes of 1935, as amended (Deering Act No. 8780d, as amended), hereinafter referred to as the Unemployment Insurance Act.

The Debtor, Berlin and Russell Aircraft Machine and Manufacturing Company, a co-partnership of H. M. Berlin and C. T. Russell, was formed and commenced business operations in the State of California on or about November 7, 1941, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California.

On or about April 3, 1941, the Debtor filed in the above-entitled Court and proceeding its petition un-

der Chapter XI of the Federal Bankruptcy Act; pursuant to the order or permission of the Court, the Debtor continued in possession of its business and property, and continued to operate the same until May 16, 1941, on which date the Debtor ceased operations.

During the first quarter of the calendar year 1941, that is, the [2] period commencing January 1, 1941, and ending on March 31, 1941, the Debtor paid wages to its employees in the State of California in the total amount of \$42,400.17. During the period commencing on April 1, 1941, and ending on May 16, 1941, the Debtor paid wages to its employees in the State of California in the total amount of \$23,828.88.

During all of said period from January 1, 1941, to May 16, 1941, the Debtor had in its employ in the State of California eight or more employees on each day of each week, excepting only holidays and certain Saturdays. After May 16, 1941, the Debtor had no employees.

During all of said period from January 1, 1941, to May 16, 1941, there was in effect Rule 12.1 of said California Employment Commission providing in substance that the term "week," as used in said Unemployment Insurance Act, shall mean the period of seven consecutive days commencing Sunday and ending Saturday. A copy of said Rule 12.1 is attached hereto marked "Exhibit A" and is incorporated herein by reference.

On or about November 25, 1941, there was filed

in the above-entitled proceedings on behalf of said California Employment Commission a proof of priority claim for taxes and interest itemized as follows: Contributions for period from January 1, 1941, to May 16, 1941, \$1,798.83; interest on said amount of \$1,798.83 at the rate of one per cent per month or fraction thereof from July 22, 1941, to November 30, 1941, 89.94; plus additional interest on said amount of \$1,798.83 at the rate of one per cent per month or fraction thereof from December 1, 1941, to date of payment. A copy of said proof of priority claim is attached hereto marked "Exhibit B" and is incorporated herein by reference.

Thereafter, the Debtor denied liability for the above-mentioned [3] taxes and requested instructions, whereupon the above-entitled Court ordered a hearing upon the priority claim of said California Employment Commission, to be had before said Court on December 29, 1941. Pursuant to agreement of the parties, said hearing was continued to January 5, 1942, on which date the matter was duly heard by said Court.

Thereafter and on January 26, 1942, the above-entitled Court made and entered its order wherein it was adjudged and decreed that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment Commission heretofore filed herein for unemployment tax is denied. A copy of said order

is attached hereto marked "Exhibit C" and is incorporated herein by reference.

Thereafter and on February 20, 1942, the California Employment Commission duly filed with the above-entitled Court a notice of appeal from said order made and entered on January 26, 1942. A copy of said notice of appeal is attached hereto marked "Exhibit D" and is incorporated herein by reference.

On March 18, 1942, the above-entitled Court made and entered an order allowing the California Employment Commission to April 30, 1942, to file the record on appeal herein. A copy of said order is attached hereto, marked "Exhibit E" and is incorporated herein by reference. On April 22, 1942, the above-entitled Court made and entered an order further extending said time to May 21, 1942. A copy of said order is attached hereto marked "Exhibit F" and is incorporated herein by reference. On May 15, 1942, the United States Circuit Court of Appeals for the Ninth Circuit made and entered an order further extending said time to and including June 22, 1942. A copy of said order is attached hereto marked "Exhibit G" and is [4] incorporated herein by reference.

The points to be relied on by the California Employment Commission, appellant herein, are as follows:

1. The District Court erred in ordering, adjudging, and decreeing that under the provisions of Sec-

tion 9, Section 37 and Section 38 of the California Unemployment Insurance Act, the calendar year extending January 1 to December 31, inclusive, constitutes the taxable year.

2. The District Court erred in ordering, adjudging and decreeing that under the aforementioned provisions of the California Unemployment Insurance Act, a week constitutes a period of seven (7) days, beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year, **only in the event that such day is one of the seven days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Act means twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.**

3. The District Court erred in ordering, adjudging and decreeing that since January 1, 1941, fell on a Wednesday, and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than twenty weeks within the calendar year of 1941.

4. The District Court erred in ordering, adjudging and decreeing that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment

Commission [5] heretofore filed herein for unemployment tax is denied.

EARL WARREN,

Attorney General of the State
of California.

JOHN J. DAILEY, Deputy

MAURICE P. McCAFFREY,

SAMUEL L. GOLD, and

GLENN V. WALLS, of Counsel.

By: SAMUEL L. GOLD,

Attorneys for California Employment
Commission.

Approved by:

CHARLES PECKHAM,

Attorney for Debtor.

Approved, this 19 day of June, 1942.

H. A. HOLLZER,

Judge of the Above-Entitled Court..

[Endorsed]: Filed June 20, 1942. [6]

EXHIBIT A

State of California

Department of Employment

Rules and Regulations of California

Employment Commission

Revised Rule

Rule 12.1 — Term Week Defined. The term
“week,” unless the wording clearly otherwise re-

quires, whenever used in the Act, Rules and Regulations, forms, procedures and instructions thereon and all other official pronouncements of the Department of Employment, shall mean the period of seven consecutive days commencing Sunday and ending Saturday.

This revised rule shall become effective September 29, 1940, provided that an employing unit shall not become an employer subject to the Act solely by reason of its employment of four or more individuals upon said effective date if such employing unit has not, prior to said effective date, employed four or more persons in each of more than nineteen "weeks".

(Effective Date: September 29, 1940) [7]

EXHIBIT B

In the District Court of the United States
in and for the Southern District of
California, Central Division

No. 38270-H

In Proceedings Under Chapter XI
Proof of Priority Claim for Taxes
Employer's Account No. 51-3560

In the Matter of BERLIN & RUSSELL AIR-
CRAFT COMPANY,

Debtor.

On the 25th day of November, 1941, came Charles J. Ross and made oath and said:

1. That he is one of the authorized and acting agents of the California Employment Commission, and as such he is qualified and empowered to make this claim on behalf of the said Commission:

2. That the consideration of the debt is a tax duly levied and assessed under the provisions of the Unemployment Insurance Act, as amended.

3. That he is informed and believes the said Berlin & Russell Aircraft Company, Debtor, was, at or before the filing of the debtor's petition, and is now justly and truly indebted to the State of California, as follows:

Per DE 914, #70032, attached:

Unpaid contributions	\$1,798.83
Accrued interest to 11-30-41.....	89.94
Penalty	179.88
	<hr/>
DE 914	\$2,068.65
Less penalty	179.88
	<hr/>
Claim	<u>\$1,888.77</u>

Plus additional interest on \$1,798.83 at 1% per month, or fraction thereof, from 12-1-41 to date of payment.

4. That this claim is entitled to the Priority provided by Sec. 64a of the Bankruptcy Act:

5. That the due date for the said tax is past; that no part of the said tax has been paid except as above stated; that there are no set-offs or counter-claims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any

person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax or interest or penalty whatever, except as follows:

CALIFORNIA EMPLOYMENT
COMMISSION
CHARLES J. ROSS

Subscribed and sworn to before me this 25th day of November, 1941.

[Seal]

MAY KETLEY

Notary Public in and for the
County of Sacramento,
State of California.

Make all checks payable to Department of Employment, and mail attention Collection Unit, 1025 P Street, Sacramento, California.

DE 273 (Rev. 2) [8]

EXHIBIT C

In the United States District Court
Southern District of California
Central Division

No. 38,270-H Bkey.

In the Matter of BERLIN AND RUSSELL AIR-
CRAFT MACHINE AND MANUFACTUR-
ING COMPANY, a Co-partnership,
Debtor.

ORDER PROVIDING THAT DEBTOR IS NOT

SUBJECT TO CALIFORNIA EMPLOYMENT COMMISSION FOR UNEMPLOYMENT TAXES.

The above-entitled matter having come on further to be heard on Monday, the 5th day of January, 1942, at the hour of 10 o'clock a. m., and notice of said hearing having been given to the California Employment Commission, and such notice being deemed by this Court to be sufficient, and it having been stipulated by the debtor, through its attorney, Charles Peckham; Charles T. Russell, individually, through his attorney Arthur H. Deibert; and the California Employment Commission—which said Commission has heretofore filed its claim herein for unemployment taxes and interest in the total amount of \$1,888.77—through Earl Warren, Attorney General, and Samuel L. Gold, of counsel, that:

(1) The Debtor Co-partnership of Berlin and Russell Aircraft Machine and Manufacturing Company was formed on November 7, 1940.

(2) The payroll of the debtor from November 7, 1940, to December 31, 1940, was \$2,220.66, and if any unemployment tax to the United States and to the State of California jointly was incurred by the Debtor during said period, said tax was in the amount of \$66.62; [9] of which amount the State of California would be entitled to a sum not exceeding \$59.96.

(3) That for the first quarter of the calendar

year 1941, said quarter ending March 31, 1941, the payroll of the Debtor was \$42,400.17, and if any unemployment tax to the United States and to the State of California jointly was incurred by the debtor during the said period, said tax was in amount of \$1,272.01; of which amount the State of California would be entitled to a sum not exceeding \$1,144.80.

(4) That for the period April 1, 1941, to May 16, 1941, inclusive, (the latter date being the date on which the sale of certain of the assets of the Debtor to Intercontinent Aircraft Corporation became effective by order of this Court, since which time the Debtor has not had any employees) the payroll was \$23,828.88, and if any Unemployment Tax to the United States and to the State of California jointly was incurred by the Debtor during the said period, said tax was in the amount of \$714.87; of which amount the State of California would be entitled to a sum not exceeding \$643.38.

(5) The Debtor did not file any returns under the Federal Unemployment Tax Act or under the California Unemployment Insurance Act for the reason that it believed it was not liable for the said tax under either of said Acts.

(6) From January 1, 1941, to May 16, 1941, inclusive, the Debtor employed 8 or more persons during each week day of that period, with the exception of holidays and some Saturdays.

(7) The Debtor has had no employees since cer-

tain of its assets were sold to Intercontinent Aircraft Corporation as of the close [10] of business on May 16, 1941.

And the above-entitled Court having heard the statements of counsel and having been fully advised in the premises, and Good Cause Appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that under the provisions of Section 9, Section 37 and Section 38 of the California Unemployment Insurance Act, the calendar year extending January 1 to December 31, inclusive, constitutes the taxable year.

It Is Further Ordered, Adjudged and Decreed that under the aforementioned provisions of the California Unemployment Insurance Act, a week constitutes a period of seven (7) days, beginning Sunday morning and ending the following Saturday night and wholly within one and the same calendar year; that a day may be counted as being a day during a taxable (calendar) year, only in the event that such day is one of the 7 days of one and the same week falling entirely within one and the same calendar year and that the twenty weeks period specified in said Act means twenty calendar weeks, each week beginning on Sunday morning and ending the following Saturday night, and all of such weeks falling wholly within one and the same calendar year.

It Is Further Ordered, Adjudged and Decreed

that since January 1, 1941, fell on a Wednesday, and May 16, 1941, fell on a Friday, such period extending from January 1, 1941, to May 16, 1941, inclusive, constituted less than twenty weeks within the calendar year of 1941.

It Is Further Ordered, Adjudged and Decreed that the Debtor herein is not subject to the California Unemployment Insurance Act and that the claim of the California Employment Commission [11] heretofore filed herein for unemployment tax, be, and the same is hereby denied.

Dated: this 26th day of January, 1942.

HARRY A. HOLLZER

Judge of the United States
District Court. [12]

EXHIBIT D

Earl Warren, Attorney General

John J. Dailey, Deputy

Maurice P. McCaffrey,

Glenn V. Walls,

Samuel L. Gold,

Of Counsel

1025 P Street

Sacramento, California

Attorneys for California Employment Commission

In the United States District Court

Southern District of California

Central Division

No. 38,270 H Bankruptcy

In the Matter of BERLIN and RUSSELL AIR-

CRAFT MACHINE and MANUFACTURING COMPANY, a copartnership,

Debtor.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Notice is hereby given that the California Employment Commission, an administrative agency of the State of California, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order entered in the above debtor proceedings on January 26, 1942, and from the whole of said order, which order provided that the above debtor is not subject to the California Unemployment Insurance Act and [13] denied the claim of said California Employment Commission for unemployment taxes.

EARL WARREN,

Attorney General

JOHN J. DAILEY,

Deputy

MAURICE P. McCAFFREY,

SAMUEL L. GOLD

GLENN V. WALLS,

Of Counsel

By /s/ SAMUEL L. GOLD

Attorneys for California Employment Commission

1025 P Street

Sacramento, California [14]

EXHIBIT E

Earl Warren, Attorney General
Maurice P. McCaffrey
Samuel L. Gold, Of Counsel
1025 P Street
Sacramento, California
Attorneys for California Employment
Commission

In the United States District Court, Southern
District of California, Central Division

No. 38,270-H

BANKRUPTCY

In the Matter of:

BERLIN and RUSSELL AIRCRAFT MACHINE
and MANUFACTURING COMPANY, a co-
partnership,

Debtor.

EXTENSION OF TIME TO FILE RECORD ON
APPEAL TO THE CIRCUIT COURT OF
APPEALS FOR THE NINTH DISTRICT.

Good cause appearing therefor, it is hereby or-
dered that the California Employment Commission
may have to April 30, 1942, to file the record on ap-
peal to the Circuit Court of Appeals of the Ninth
District.

Dated: 18th day of March, 1942.

/s/ HARRY A. HOLLZER,
Judge of the District Court. [15]

EXHIBIT F

Earl Warren, Attorney General
John J. Dailey, Deputy
Maurice P. McCaffrey and
Samuel L. Gold,
Of Counsel
1025 "P" Street
Sacramento, California
Attorneys for California Employment
Commission

In the United States District Court, Southern Dis-
trict of California, Central Division.

No. 38,270-H

BANKRUPTCY

In the Matter of:

BERLIN and RUSSELL AIRCRAFT MACHINE
and MANUFACTURING COMPANY, a co-
partnership,

Debtor.

EXTENSION OF TIME TO FILE RECORD ON
APPEAL TO THE CIRCUIT COURT OF
APPEALS FOR THE NINTH DISTRICT.

Good cause appearing therefor, it is hereby or-
dered that the California Employment Commission
may have to May 21, 1942, to file the record on ap-
peal to the Circuit Court of Appeals of the Ninth
District.

Dated: This 22nd day of April, 1942.

/s/ HARRY A. HOLLZER,

Judge of the District Court. [16]

EXHIBIT G

Earl Warren, Attorney General

John J. Dailey, Deputy

600 State Building, S. F.

Maurice P. McCaffrey

Glenn V. Walls, and

Samuel L. Gold, Of Counsel.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 38270-H

BANKRUPTCY

In the Matter of

BERLIN and RUSSELL AIRCRAFT MACHINE
and MANUFACTURING COMPANY, a co-
partnership,

Debtor,

CALIFORNIA EMPLOYMENT COMMISSION,
Appellant.

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Good cause appearing therefor, it is hereby ordered that the California Employment Commission may have to and including the 22nd day of June 1942, within which to file the record on appeal in the above entitled matter to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 15th day of May, 1942.

FRANCIS A. GARRECHT,

Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.

[Endorsed]: Order, etc. Filed May 14, 1942. Paul
P. O'Brien, Clerk. [17]

[Title of Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive contains the original Agreed Statement of Case which constitutes the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$3.05 which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 20th day of June, A. D. 1942.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE, Deputy. [18]

[Endorsed]: No. 10173. United States Circuit Court of Appeals for the Ninth Circuit. In the matter of Berlin and Russel Aircraft Machine and Manufacturing Company, a copartnership, California Employment Commission, an administrative agency of the State of California, Appellant, vs. Berlin and Russell Aircraft Machine and Manufacturing Company, a co-partnership of H. M. Berlin and C. T. Russell, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States

20 *California Employment Commission vs.*

for the Southern District of California, Central
Division.

Filed June 22, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 38270-H

IN BANKRUPTCY
CALIFORNIA EMPLOYMENT COMMISSION,
Appellant,

vs.

BERLIN and RUSSELL AIRCRAFT MACHINE
and MANUFACTURING COMPANY, a co-
partnership,

Debtor-Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PRINTED
RECORD

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

You are hereby notified that the appellant adopts
and here incorporates by reference as the Statement
of Points on which it is intended to rely on appeal
the appellant's statement of points appearing in the
Agreed Statement of case heretofore transmitted to
this court as the record on appeal.

You are further notified that the appellant designates for printing the entire Agreed Statement of Case, and the exhibits, papers or documents appended thereto, heretofore submitted to this court as the record on appeal herein.

EARL WARREN,
Attorney General of the State
of California,
JOHN J. DAILEY, Deputy
MAURICE P. McCAFFREY,
SAMUEL L. GOLD, and
GLENN V. WALLS, Of Counsel.

By GLENN V. WALLS,
Attorneys for Appellant.

[Title of Court and Cause.]

State of California,
County of Sacramento.—ss.

AFFIDAVIT OF SERVICE BY MAIL

Anna Rose Shalag, being first duly sworn, says:
That affiant is a citizen of the United States and a resident of the City of Sacramento, County of Sacramento, State of California; that affiant is over the age of 18 years and is not a party to the within and above entitled cause; that affiant's business address is 1025 P Street, in the City of Sacramento, County of Sacramento, State of California.

That on the 19th day of June, 1942, affiant served

the within Appellant's Statement of Points and Designation of Printed Record on the appellee in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said appellee, at the office address of said attorney as follows:

Charles Peckham, Esq.
Suite 710 Title Insurance Bldg.
433 S. Spring Street
Los Angeles, California

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Sacramento, California, where is located the office of the attorneys for the appellant, California Employment Commission, for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

ANNA ROSE SHALAG,
Affiant.

Subscribed and sworn to before me this 19th day of June, 1942.

[Seal] AMY B. WARNER,
Notary Public in and for the County of Sacramento,
State of California.